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“Wake Up, Mr. West!”: Distinguishing Albums and Compilations for Statutory Damages in Copyright within a Streaming-Centric Music Economy

Tyler Laurence*

The concept of the music album has been a vital cornerstone of the recorded music industry since its adoption in the form of the long-play vinyl record in 1948. For over sixty years, the ability for artists to package a cohesive collection of performances has remained of paramount priority and an art within itself, notwithstanding the flurry of technological innovations that have altered the album’s size, shape, length, and interactivity. These collections of songs have even withstood the so-called “era of unbundilization,” as digital music services declared a new piecemeal distribution standard of albums through the turn of the century. While consumers began to dismantle albums by purchasing individual digital song downloads (and decimating industry revenue in the process), the creative community nevertheless continued to conceive, produce, market, and release musical works in a cohesive “album” format. To this day, courts have interpreted the Copyright Act to include albums in the generous definition of compilations, for the purposes of calculating statutory damage awards.

This unbundilization of content—and thus the remodeling of the album format—is no stranger to the federal court system. Judges have exhibited an immense amount of discordance over the last

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ten years, debating whether albums should still be considered “one work” in the context of digital music stores, and thus no longer warrant single statutory damage awards in infringement claims. Yet in the middle of this ongoing debate, the introduction of on-demand music streaming flipped the idea of an album on its head once more, this time threatening the very essence of the album: permanence. In recent years, streaming platforms have been used as tools to allow artists to further enlarge, redact, swap, and otherwise manipulate their albums post release in reacting to consumer behavior, in real time. Analogous to a digital software application, this new album delivery mechanism erases the permanence of the long–form musical experience, creating, as Mr. Kanye West declared, “a living, breathing, changing creative expression.”

Courts will now be forced to thread the needle in interpreting the collective work, compilation, and derivative work, definitions—in addition to distinguishing the conflicting tests used among the courts left over from the iTunes generation—in the face of multiple, disparate album release methods. This comment explores this unsettled terrain of music copyright law, analyzes the various approaches courts will likely employ, and argues for a new standard to define mercurial albums released through on-demand streaming services in order to most appropriately incentivize musical innovation while equitably compensating rights holders in future copyright infringement claims.

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I. INTRODUCTION

It is a brisk November in 1982, and young Jimmy waits impatiently outside of his neighborhood Tower Records to get his hands on new music from the “King of Pop.” As he rushes home to drop the needle on Michael Jackson’s *Thriller*, little does he know that the next 45 minutes would introduce him to the industry’s highest grossing, and most influential, album of all time.\(^1\) Through a roller coaster of emotions and a buffet of innovative production styles, Jackson masterfully and methodically weaves together each individual track in order to achieve full artistic effect, and, in a sense, a piece of free-standing art. Naturally, Jackson “starts” his masterpiece with an intense drum-machine groove and funk-driven song, “Wanna Be Startin’ Somethin”; fittingly, the album’s midway point culminates with his epic and over-the-top *magnum opus*—“Thriller.”\(^2\) As the record ebbs and flows to its conclusion, it becomes clear to Jimmy that the art of the album’s arrangement and coordination is just as important as the contents therein.

Fast forward, and today’s young Jimmy listens intently to Kanye West’s *The Life of Pablo* by way of his latest subscription to music

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streaming service, TIDAL.\(^3\) Knowing every twist, turn, rhythm, and rhyme of the Hip Hop saga, Jimmy is surprised two weeks later when the album’s lyrics have been mysteriously changed, songs have been added and reorganized, and verses have been cut entirely from recordings. After all, Jimmy is no longer listening through a piece of tangible hardware, but rather through an online streaming service provider. Stunned, today’s Jimmy begins to wonder how this is even possible: how can a musician completely alter a previously published and seemingly finalized work?

Today’s Jimmy quickly realizes that the albums of today are quite different from the albums of the vinyl, cassette, CD, and even iTunes generations. While the concept of an “album”—one or more recordings (on a tape or disc) produced as a single unit\(^4\)—is in fact a relatively new invention,\(^5\) it has nevertheless been the standard of recorded music distribution for nearly 70 years. Irrespective of their medium, albums have enabled record companies to organize their artists’ musical works and deliver a cohesive collection of completed performances to the public in a concert–like fashion. However, in just the last decade, the meteoric rise in streaming popularity has changed artists’ distribution methods and view of the album format altogether, while altering consumers’ consumption patterns and expectations in the process.

Such transformations in technological and distribution trends are set on a crash course with the Copyright Act, and particularly the statutory damage provision of Section 504(c)\(^6\). Under the Act, a copyright owner in a prevailing copyright infringement case may elect to recover statutory damages for each work infringed upon, regardless of the number of infringing acts to the work itself.\(^7\) While the Act fails to provide a definition of “work”,\(^8\) the Act notes that “all parts of a compilation or derivative work constitute one work,”\(^9\) regardless of the amount of

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3 West released his 2016 album, *The Life of Pablo*, exclusively through the on-demand premium streaming platform, TIDAL, and continuously altered the release of the record through the subsequent months of release. *Infra* Section IV(A).


7 *Id.*

8 Justin Hughes, *Size Matters (or Should) in Copyright Law*, 74 FORDHAM L. REV. 575, 622 (2005) (“The one area of law where the absence of a statutory definition of ‘work’ has challenged courts is in damage calculations, because copyright law affords statutory damages based on the infringement of each work.”).

9 The Act defines a “compilation” as “a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way
previously registered works or independent economically viable works contained therein.\(^9\) Surprisingly, the statute is silent as to whether or not compilations are inclusive of traditional music albums. The incumbent approach, employed by multiple circuits, looked to whether or not each work has “independent economic value” apart from the compilation and therefore a viable copyright.\(^{11}\) However, in Bryant v. Media Right Productions, an iTunes-generation case analyzing the statutory damage provision of the Copyright Act for alleged infringement of copyrights in musical albums, the Second Circuit held that albums fall under the expansive definition of compilations for statutory damage purposes.\(^{12}\) Developing a circuit split within the federal judiciary, the Second Circuit’s ruling limited the copyright owner to a single award, irrespective of the number of embedded sound recordings infringed upon.\(^{13}\)

Despite the active debate as to the appropriateness of this album-compilation confluence in an iTunes music economy,\(^{14}\) there remains a lack of scholarly work analyzing the applicability of albums as compilations within the current music ecosystem, which has drastically evolved since Bryant years ago.\(^{15}\) The industry has since shifted to a

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\(^10\) See, e.g., Gamma Audio & Video, Inc. v. Ean–Chea, 11 F.3d 1106, 1116–17 (1st Cir. 1993).


\(^12\) See, e.g., Copyright—Statutory Damages—Second Circuit Holds That An Album of Music Is A Compilation, 124 Harv. L. Rev. 851 (2011) (arguing against the Second Circuit’s decision, since the rejection of the “independent economic value” test established in several sister circuits “undermines the centrality of works of authorship to U.S. copyright law.”); Wyatt J. Glynn, Comment, Musical Albums as “Compilations”: A Limitation on Damages or a Trojan Horse Set to Ambush Termination Rights?, 26 Berkley Tech. L.J. 375 (2011) (arguing that the Second Circuit’s holding may lead to the unintended consequence of turning musician’s work made for hire); but see Brian A. Oliver, One Album Warrants One Award: Harmonizing the Copyright Act’s Statutory Damages Schema with the Unbundled Recorded Music History, 32 Ent. & Sports Lawyer 1 (Spring 2015) (arguing for a single, per-album award, as such reasoning comports with legislative purpose and better protects the non-shielded stakeholders from overbearing litigation within a highly evolving marketplace).

\(^13\) In 2010, Spotify, the world’s current leader in paid subscription on-demand streaming, had not yet operated in the United States. At the time, the technology company amassed a mere 500,000 paid subscribers worldwide, and approximately 7 million total users; see Om Malik, Do The Math: How Big Will Spotify’s Revenues Be in 2010, GIGA Om https://gigaom.com/2010/11/22.spotify-2010-revenues/. As of January 2018, the service boasts over 70 million paid subscribers, and 140 million total users. See About: What is Spotify? Fast Facts, SPOTIFY PRESS (https://press.spotify.com/us/about/).
direct-to-consumer streaming model, and in the process, redefined an album’s purpose, size, execution, and, most importantly, malleability, as artists are now able to make substantive alterations to already commercialized and finalized pieces of work.16

This comment magnifies a recent trend in music technology, which has redefined what it means to be a musical album in the age of streaming. After analyzing these seismic industry shifts, this comment lays the fundamental groundwork of the Copyright Act of 1976, focuses on the statutory damage award provision of Section 504(c), and details various judicial decisions surrounding the statute. Next, this note analyzes the negative implications that the current one–album, one–award provision may have when applied to the streaming industry’s revolutionary albums–turned–playlists, which are currently not protected under United States copyright law. Through this lens, Kanye West’s The Life of Pablo serves as an illustrative case study of the pioneering technological advancements in album release methods. Finally, this comment explores alternatives to the Bryant decision by running The Life of Pablo through a hypothetical infringement gauntlet concluding that in the interest of advancing artistic creativity through deterring unwarranted behavior, an economic life–based model is the most equitable method of calculating statutory damage amounts in a streaming society.

II. EXTERNAL SOURCES AFFECTING ALBUM CONSUMPTION THROUGHOUT THE CENTURY

Over the past one hundred years, innovations within music production and distribution have not only affected how consumers interact and value albums, but have also dictated how musicians create, exploit, and protect their art. From a production point of view, a plethora of “pro–sumer” recording products have flooded the marketplace, dramatically reducing the cost to produce commercial–quality music and diminishing many barriers to entry for content creators.17

From a distribution perspective, when vinyl and cassettes once limited the ability to cherry–pick songs, consumers placed value in the complete experience of an album from start to finish. Musicians during this period often selected an album’s various “hit” singles to release independently, in an effort to promote the entire record on the radio. Such a record was then sold at a relatively high price to overcome substantial production and

16 See infra Section IV(A).

manufacturing costs.\textsuperscript{18} The advent of the Compact Disc—developed by computer company Phillips and entertainment company Sony\textsuperscript{19}—introduced a tremendous increase in an album’s length (usually up to 80 minutes of recorded music) and individual song autonomy, allowing consumers to skip through entire albums and enjoy specific songs. A decade later featured the Steve Jobs digital revolution, in which iTunes unbundled albums into 99 cent individual song purchases.\textsuperscript{20} During this era, despite the record labels’ need to shift their attention to selling tracks as opposed to albums, both traditional and digital albums were still being conceived, produced, packaged, and sold. However, a fundamentally different music industry emerged from its long–form predecessors, as the industry boasted 25 million single downloads by December 2003.\textsuperscript{21}

Despite numerous phases of innovation, one core concept of the traditional “album” stayed intact. When producing a record, labels would need to deem a collection of their artists’ songs finalized for commercial purposes, arrange the order of the recordings, and sell this collection of songs to the public. This process reflects the artist and record labels’ desires to tell stories, define contractual obligations, win awards, and easily track sales. The process has even influenced certain aspects of the copyright registration process, as albums were routinely registered collectively, in order to reduce fees and save time.\textsuperscript{22}

\section*{A. Streaming on the Rise}

Recently, the industry has gone through its most transformative upheaval in decades due to the rise of audio streaming services. These


\textsuperscript{21} The iTunes revolution also resulted in drastically reduced album prices for consumers yet heavily reduced overall music revenue. While listeners consumed more music during the 2000s than ever before, music sales revenue dropped from $11.8 billion in 2003 to $7.1 billion in 2012. See Adrian Covert, \textit{A decade of iTunes singles killed the music industry}, \textit{CNN} (Apr. 25, 2013), http://money.cnn.com/2013/04/25/technology/itunes-music-decline/.

\textsuperscript{22} See \textit{U.S. Copyright Off.}, Circular 50, \textit{Copyright Registration for Musical Compositions} 2 (2012).
platforms—interactive and non–interactive—enable users to enjoy scores of content instantly over Wi–Fi and cellular connections, without any direct ownership. As opposed to selling individual albums, songs, or licenses for digital downloads, streaming companies have shifted to licensing their entire catalogue to users, in exchange for advertisement sales or premium subscription plans. By way of generous licensing agreements with the three major record conglomerates, the streaming services have amassed millions of the world’s songs onto their libraries, constantly updating their catalogue. As these technology firms develop increasing leverage over the historically powerful labels, the artists continue to build direct relationships with (and often purchase equity in) these services. The transient nature of these applications has, in turn, changed consumers’ attitudes toward the concept of purchasing music altogether. Similar to purchasing a mobile application or subscribing to a cable service provider, the actual ownership of the digital asset no longer exists.

The past two years have proven to be pivotal in the streaming revolution. Sales revenue for paid and ad–supported streaming, together, totaled $3.9 billion in 2016—accounting for 51% of total music revenue and surpassing permanent downloads and physical albums as the industry’s leading revenue source. Conversely, the intense increase of music streaming has resulted in a stark decline in both digital downloads and physical sales, down 22% and 16% from 2015, respectively. In 2017, revenues from streaming platforms grew 41% to $5.7 billion, accounting

23 The term “interactive” refers to a streaming platform that enables the user to select a specific piece of content. Also known as on–demand streaming, this type of streaming service. See Licensing 101, SOUNDEXCHANGE, https://www.soundexchange.com/service-provider/licensing-101/. See Josh Constine, The Truth About Streaming: It Pays Labels A Lot, They Don’t Pay Musicians, TECHCRUNCH (Sept. 23, 2015), https://techcrunch.com/2015/09/23/mo-users-mo-money/ (noting that streaming services pay out at least 70% of their revenue to rights holders).

24 Id. (the term “non–interactive” refers to a streaming platform in which its service determines a set list of content through user parameters, akin to online radio. Pandora reigns supreme as the industry’s largest non–interactive streaming services, with approximately 4 million paid subscribers).


28 Id.
for 65% of overall industry revenue.\textsuperscript{30} Growing sizably for two consecutive years, the industry has finally recovered to its 2008 revenue levels.\textsuperscript{31} Suffice it to say, the streaming medium is here to stay, and just beginning to achieve full–market participation and saturation.\textsuperscript{32} In sum, the music industry’s power is now centralized within a few powerful technology companies which offer both on–demand and passive access to music catalogues in exchange for advertisement space or subscription fees. These services allow both label–signed and independent artists to interact directly with their fans and utilize the services’ data as insightful market research to bolster their careers.\textsuperscript{33} Such consumption patterns have brought the music industry one step closer to a software industry: the days of purchasing albums and songs have been replaced with purchasing access to an unlimited stream of data, which is constantly altered by the few streaming gatekeepers who provide the content to the masses’ ears.

B. Oh Albums, They are a Changin’

The economic successes of music consumption by way of streaming individual songs and the artists’ access to data driven listener habits have also altered the decisions artists and their labels now make in the distribution process, questioning the viability of the album format altogether. For example, many labels are releasing a series of singles over the course of a year, in order to keep their artists relevant in a noisy marketplace and increase their likelihood of being featured on popular playlists.\textsuperscript{34} In addition, the fight for attention in a hypercompetitive media landscape has forced the hand of the record labels to provide quick hits and later re–package the tracks into EPs or LPs.\textsuperscript{35} Albums have an even


\textsuperscript{31} Id.


\textsuperscript{33} Spotify’s innovative “artist services” platform allows artists the ability to track and target their audience more efficiently, while building an ancillary profit center for the streaming giant. See Jenn Pelly, Spotify Launches Site Explaining Business Model, Offering Artist Services in Response to Criticism, PITCHFORK (Dec. 3, 2013), http://pitchfork.com/news/53205-spotify-launches-site-explaining-business-model-offering-artist-services-in-response-to-skepticism/.


\textsuperscript{35} Id. An example of an act who has experimented with these methods is Macklemore & Ryan Lewis, who released singles from their debut album over a year before their full–length album release, in order to build fanfare and a brand awareness. See Ashley
further reduced role as evidenced by the new rules distinguishing Gold, Platinum, Double Platinum, and Diamond record sales by the Recording Industry Association of America. The new rules indicate that individual singles downloads and streams all count towards the chart progress of an album.37 As well, songs released long before the LP still count towards album sales so long as they are included on the LP.38 “1,500 on–demand song streams in the United States [hold] the same value as 10 individual track sales or one full album sale,”39 which may go some way to explaining why hip–hop artist Drake included “Hotline Bling”—released in July of 2015—onto the end of his album, Views nearly nine months later.40

While the so–called “death” of the album format has drawn both proponents and critics,41 artists are nevertheless continuing to leverage streaming technology to experiment with the format and push their storytelling capabilities.42 Blurring the lines between traditional albums, playlists, and audiovisual bundles, these ingenious experiments are beginning to cause tension with the Copyright Act’s assumed definition of musical albums, as discussed below.

Rodriguez, Unless you’re Adele, you have no business releasing album tracks all at once, QUARTZ (Nov. 03, 2015), https://qz.com/536000/unless-youre-adele-you-have-no-business-releasing-album-tracks-all-at-once/.  
36 See Ben Sisaro, Billboard, Changing the Charts, Will Count Streaming Services, N.Y. TIMES, Nov. 19, 2014 at C1.  
37 See id.  
38 See id.  
40 See id.  
III. THE STATUTORY AND COMMON LAW HISTORY OF ALBUM COPYRIGHT IN LIGHT OF TECHNOLOGICAL INNOVATION

A. Copyright law Basics, Compilations, and Registration

Before exploring the specific damage award provision of the Copyright Act as it pertains to albums, it is first necessary to define and explain the various copyrightable elements at play in the release of an album. The Copyright Act affords protection to “original works of authorship in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated . . . .”43 Fundamentally, two of the overarching tenets of the Copyright Act focus on promoting and developing progress of the arts,44 and protecting creative works of expression against infringers through deterrence.45

Among these works of authorship are musical works,46 which protect the song’s underlying music, lyrics, and structure (known together as the composition), and sound recordings,47 which protect the produced and engineered performance of a composition.48 Therefore, one completely original recorded piece of music contains within it two or more copyrights: the rights of the composition performed (historically owned by songwriters and their publishers), and the rights of those songs embodied in a fixed medium (historically owned by artists and their record labels).49

i. Compilations and Collective Works

Due to the artistry often involved in arranging pre-existing pieces of material in a particular order, the Act grants additional copyright protection to compilations and collective works.50 The Act defines a compilation as “a work formed by the collection and assembling of

44 U.S. CONST. art I, § 8, cl. 8 (granting Congress power to enact law “[t]o promote the Progress of Science and useful Arts, by security for limited Time to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”).
48 These works are “created” when fixed in a copy or phono-record for the first time. Further, where the work has been prepared in different versions, each version constitutes a separate work. 17 U.S.C. § 101 (2016).
49 See generally DONALD PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS 337 (8th ed. 2012).
preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship." Among such compilations are collective works, which are independently defined as "a work, such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting a separate work in themselves, are assembled into a collective whole." Importantly, the copyright of a compilation extends only to the coordination, arrangement, and organization of the material, but not to the material itself.

ii. Copyright Registration

The Copyright Office provides ample flexibility in allowing copyright holders the ability to register multiple works at once. For example, recording artists and record labels with copyright ownership commonly seek to register individual sound recordings and the album’s arrangement simultaneously. This method helps reduce the often-expensive registration fees; instead, the registrant pays one fee for all works submitted (regardless of whether or not they are released together or separately). Alternatively, the registrant may register each work individually as they are created and register a separate compilation copyright should the registrant wish to protect the arrangement and coordination of the song order. With respect to a collective work, copyright registration will cover both the individual sound recordings and the selection, coordination, or arrangement of the collective work if “(1) the collective work and the individual sound recordings are owned by the same party, and (2) the individual sound recordings have not been previously published or previously registered and are not in the public

51 Id.
52 Id. Illustrative examples of compilations of data or collective works, provided by the Copyright Office in Circular 14, include directories of services in a specific geographic region, lists of best short stories from a particular year, collections of sound recordings of top hits of a particular year, a book of greatest news photos, and websites containing a combination of text, photos, and graphics. See U.S. Copyright Off., 14.1013, Circular 14: Copyright in Derivative Works and Compilations 2 (2013).
54 “Collections of Work”—distinguished from a “collective work”—are often registered by individuals looking to protect more than one musical work at a time. These collections require that the work be owned exclusively by a common individual if unpublished or owned by the same claimant it previously published. See U.S. Copyright Off., 50.0712, Circular 50: Copyright Registration for Musical Compositions 5 (2012).
domain.” This would therefore be a permissible move by a recording artist who has created an album of complete originality.

iii. An Album’s Definitional Role

While individual compositions, sound recordings, compilations of pre–existing works, and collective works are all statutorily defined and illustrated, the statute is silent on any definition or illustrative example of a musical “album.” A possible reason for Congress’ silence on the topic may be due to the lack of consistency an album assembly within the music industry. For instance, many independent recording artists write, record, and arrange their own music without any single releases or cover performances of other songwriter’s compositions. Other times, record labels, which regularly own the copyrights of their signed recording artists, use various singles and cover performances to test successes within the market, and subsequently develop the album’s arrangement. Even further, certain labels specialize in the release of so–called “legacy catalogue” and capitalize on their copyrights through re–releases of an artist’s previously released music. Moreover, while some albums coordinate a collection of work in a non–creative matter (i.e. alphabetically or chronologically), which do not merit copyright protection, other albums feature enough creative structure, organization, or story to rise to the level of copyrightability.

A second possible reason for Congress’ lack of inclusion of the album in the statute is the complex method in which the pieces of an album are registered with the Copyright Office. Since artists often lack the ability to forecast the contents of an album prior to release, the recording process usually results in the production of dozens of possible songs to an album. From that point, the label will dissect the deliverables for radio hits, and subsequently instruct the artist in the coordination of the album. Therefore, while the artist’s interest lies in protecting their work as soon as it is created (registering one work at a time), it is in the label’s interest to protect both the individual pieces of music and the possible creative album coordination copyright.

Whether it be due to an ambiguity in the substance of an album, the format and creativeness of an album’s arrangement, or the procedures utilized in registering the copyrightable elements of an album, such

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56 U. S. Copyright Off., 56.0917, Circular 56: Copyright Registration for Sound Recordings 6 (2017).
nuanced decisions make it increasingly difficult to define an “album” in a one–size–fits–all manner under copyright law.

B. Albums and Statutory Damages Under Section 504(c)

The understanding of the innerworkings of copyright law is essential to analyzing the rights of copyright holders in infringement suits. The following sub–sections detail both the applicable statute governing remedies for prevailing copyright infringement cases and the legislative history behind the Act’s statutory damages provision.

i. Plain Language

The owner of a timely registered copyright who prevails in a copyright infringement claim is entitled to certain possible remedies, depending on the type and severity of the infringement. Specifically, under Section 504 of the Copyright Act, the owner may collect actual damages imparted to the owner, as well as any additional profits to the infringer gained unlawfully, so long as the claimant establishes proof of the infringer’s gross revenue. However, as often times the owner may have difficulty proving such revenue, the owner may alternatively elect to collect a single statutory damage award “... with respect to any one work... in a sum of not less than $750 or more than $30,000 as the court considers just.”

While the language of Section 504(c) omits a straightforward definition of a work, the statute crucially notes that, “[f]or the purposes of this section, all the parts of a compilation or derivative work constitute one work.”

This language is the crucial element in the analysis of musical albums; should an album fall into the statutory definition of a compilation or a derivative work, then an album shall be deemed one single work for purposes of statutory damage calculations.

ii. Section 504(c)’s Legislative History

Statutory damages have not always been determined under this one–work principle. The Copyright Act of 1909 instead awarded statutory damages based on the number of infringing acts, as opposed to the number

58 See PASSMAN, supra note 49, at 367–68. Certain examples of remedies include recovering fair market value, receiving and injunction prohibiting further infringement for, forcing destruction or seizure of the work, setting criminal damages if the act is willful, and recovering court costs and attorney’s fees. Id. The most common two remedies—recovering infringers’ profits and recovering statutory damages—are explained in greater detail below.
60 17 U.S.C. § 504(c) (emphasis added).
61 Id.
of works infringed upon. However, the federal judiciary had difficulties in applying this rule to compilations and derivative works that had discrete, pre-existing internal copyrights, since the resulting damages were often grossly overstated at times and inconsistent throughout the nation. Therefore, the House Committee Report, in amending the Act, noted that a single damage award

is to be made ‘for all infringements’ involved in the action. A single infringer of a single work is liable for a single amount . . . no matter how many acts of infringement are involved in the action, and regardless of whether the acts were separate, isolated, or occurred in a related series.

With this new statutory framework, Congress aimed at protecting inventors and companies that took risks in technological innovation, while providing a fair and consistent mechanism for determining damages across various mediums.

C. The Many Different, “Work”-ing Tests

As Congress failed to define the term “work” in Section 504(c), the courts have developed differing working definitions amongst the various circuits. The four general approaches are explained in further detail below.

i. Registration Test

One way courts and scholars have proposed defining a work for statutory damage consideration is to look to the manner of registration with the Copyright Office. Because copyright proprietors have the option of registering their works of a compilation in pieces or through a single registration of a collective work, certain jurisdictions find that the option to register various individual copyrightable elements through one

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mechanism denotes a single “work” for determining damages. However, much to the chagrin of these sparse jurisdictions, the House Report commenting on the revision to Section 504(c) made clear that the statutory damage award calculations should not be based on the amount of registrations an individual infringed upon.67

ii. Independent Economic Value Test

A more popular approach taken by the D.C., First, Ninth, and Eleventh Circuits has been termed the “independent economic value test,” which provides “that a work that is part of a multi–part product can constitute a separate work for purposes of statutory damages if it has ‘independent economic value and . . . is viable.’”68 This rule was first utilized by the D.C. Circuit in *Walt Disney Co. v. Powell*, when the court held that multiple infringements of various poses of Mickey and Minnie Mouse figures on a single t–shirt constituted two separate works.69 The court noted that although one character is a derivative of the other, and although the characters appear multiple times in various postures on the infringing product, the two characters “are certainly distinct, viable works with separate economic value and lives of their own.”70

In another economic value case, the Eleventh Circuit in *MCA Television Ltd. v. Feltner* focused on whether individual episodes of a syndicated television series broadcast by a licensee constituted individual works for statutory damage purposes.71 There, the court agreed with the economic value test established in *Walt Disney Co.*, holding that each individual episode of the series constituted an individual “work.”72

67 H.R. Rep. No. 94–1476, at 162 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5779 (“Moreover, although the minimum and maximum amounts are to be multiplied where multiple ‘works’ are involved in the suit, the same is not true with respect to multiple copyrights, multiple owners, multiple exclusive rights, or multiple registrations. This point is especially important since, under a scheme of divisible copyright, it is possible to have the rights of a number of owners of separate ‘copyrights’ in a single ‘work’ infringed by one act of a defendant.”); see also *Gamma Audio & Video, Inc. v. Ean–Chea*, 11 F.3d 1106, 1117 (1st Cir. 1993) (“As the legislative history to § 504(c)(1) makes clear, the number of copyright registrations is not the unit of reference for determining the number of awards of statutory damages.”).

68 *MCA Television Ltd. v. Feltner*, 89 F.3d 776, 769 (11th Cir. 1996) (citing *Gamma Audio*, 11 F.3d at 1116); see also *Walt Disney Co. v. Powell*, 897 F.2d 565, 568 (D.C. Cir. 1990). This test is a logical offshoot stemming from the original 1909 Copyright Act. See, e.g., *Robert Stigwood Grp. v. O’Reilly*, 530 F.2d 1096, 1103 (2d Cir. 1976) (deciding that “when the components of the infringing activity are heterogeneous, the presumption is that each infringing activity is a separate infringement.”).

69 *Walt Disney Co.*, 897 F.2d at 566.

70 Id.

71 *MCA Television*, 89 F.3d at 766.

72 Id.
each episode was individually produced, individually aired, and individually copyrighted—each with independent storylines—the court rejected the “collective work”, “anthology”, and multiple airing arguments presented by the defendant. 73

Concerns of the economic life model’s applicability to traditional musical albums stem in plain meaning and legislative intent, under an assumption that the album falls under the definition of a compilation. Under a plain meaning approach, the economic life model would render “all the parts of a compilation constitute one work” language contradictory and superfluous, since compilations naturally contain multiple copyrightable elements that have independent life. 74 As for legislative intent, such interpretation of the statute would enable copyright owners of albums to recover for each individual element of the album (i.e. composition, recording, album artwork, and album as a whole), which runs contrary to Congress’ intention to limit “exorbitant” statutory damages by altering the per–infringement method to a per–work method. 75

iii. The Evolution of the Issuance Test

The departure of the independent economic value test began to take shape in Twin Peaks, where the Second Circuit held that “separately written teleplays prepared to become episodes of a weekly television series” did not constitute a compilation. 76 While Twin Peaks arrived at the same holding as it would have if it utilized an independent economic value test, the court failed to explicitly use such a test here. Instead, the court premised its argument on the issuance of the material by the plaintiff, which was separately written and separately prepared to become separate episodes. 77 However, the Second Circuit in Twin Peaks remained hesitant to answer a hypothetical situation in which one book written as a single work was adapted to a group of television episodes. 78 Likely, the court’s hesitance is indicative of their reluctance to reconcile this new theory with

73 Id. at 769; see also Columbia Pictures Television v. Krypton Broadcasting of Birmingham, Inc., 106 F.3d 284, 296 (9th Cir. 1997), rev’d on other grounds, sub nom. Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340 (1998) (noting that, in a similar fact pattern and holding, episodes “could be repeated and rearranged at the option of the broadcaster,” and, therefore, were not effectively “assembled into a collective whole.” Columbia Pictures, 106 F.3d at 295).
74 See Oliver, supra note 14.
75 Id.
76 Twin Peaks Prods., Inc. v. Publ’n Int’l Ltd., 996 F.2d 1366, 1381 (2d Cir. 1993).
77 Id. (“The author of eight scripts for eight television episodes is not limited to one award of statutory damages just because he or she can continue the plot line from one episode to the next and hold the viewers’ interest without furnishing a resolution.”).
78 Id.
the independent economic value test, and thus left it to be decided in a future case.

What would be later known as the “issuance test” resurfaced in *WB Music Corp.*, where the Second Circuit questioned whether an unauthorized CD, which infringes multiple separately owned copyrighted songs, and compiled by the defendant without authorization of the plaintiff, qualifies as a compilation.\(^{79}\) The court looked at its analysis in *Twin Peaks* as controlling, and held that the defendant’s creation of an unauthorized compilation utilizing separate copyrighted works did not fall under 504(c)’s compilation definition.\(^{80}\) However, similar to *Twin Peaks*, the court left open the question of whether this holding would be any different if the plaintiff’s individual copyrighted works were additionally included in an authorized compilation of some sort.\(^{81}\)

While the independent economic value test lingered among sister circuits, the Second Circuit stayed silent on the test, and instead viewed the cases from an issuance standpoint. Meanwhile, the unbundling music industry began to digitize and music piracy grew rampant online, district courts soon began to tackle the issue of whether an infringed digital music album qualifies as a compilation and thus subject to only one award under Section 504(c).\(^{82}\) In the first of three cases, *UMG Recordings, Inc. v. MP3.COM, Inc.*, the District Court for the Southern District of New York looked to whether a defendant, who infringed an owner’s copyrights by uploading thousands of CDs onto their servers for illegal, per song pirating, should be subject to statutory damages on an album or son basis.\(^{83}\) There, the court declined to adopt the independent economic value test, advocated by the plaintiff, and instead awarded damages on a per album basis.\(^{84}\) The court focused on the facts that the copyright holder had initially intended to have the work released in album form, and that the infringing act occurred by way of duplicating complete albums.\(^{85}\) Lastly,
the court goes so far as to say that the independent economic value analysis has never been adopted in the Second Circuit, and any other decision would be to make a total mockery of Congress’ express mandate that all parts of a compilation must be treated as a single ‘work’ for purposes of computing statutory damages, since, as the House Report expressly recognizes, the copyrighted parts of a compilation will often constitute ‘independent works for other purposes.87

The “issuance test” was later utilized throughout the Second Circuit’s analysis in Bryant—the first appellate court decision questioning whether songs issued on a single album—regardless of their independent copyrights or economic value—should be viewed as a compilation under Section 504(c).88 There, the court affirmed the decision of the Southern District Court of New York by construing Section 504(c) literally, holding that albums are compilations under Section 504(c), and are therefore limited to only one statutory damage award regardless of the amount of separate copyrightable elements involved on the album and the number of pre–existing registrations.89 By relying only on the few previous district court cases for support while distinguishing prior Second Circuit case law, the court make the logical connection between album and work by way of the term collective work.90 The court notes the term’s inclusion within the general compilation definition, and defines the term as works “in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective work.”91 Subsequently, the court provided their own definition of an album as “a collection of preexisting materials—songs—that are selected and arranged by the author in a way that results in an original work of authorship—the album.”92 The court is able to distinguish both Twin Peaks and WB Music Corp. on the grounds that in both, the plaintiff issued the works separately, and never released the songs in the form of a compilation.93

Certain academics laud the one–album, one–award model for better protecting stakeholders in a rapidly changing digital environment, in addition to striking a balance between fair compensation and exorbitant

88 See Bryant v. Media Right Productions, Inc., 603 F.3d 135 (2d Cir. 2010).
89 See id. at 142.
90 Id. at 140.
91 Id. (quoting 17 U.S.C. § 101 (2016)).
92 Id. at 140–41.
93 Bryant, 603 F.3d at 141.
compensation. Other scholars have been quick to criticize the Second Circuit’s departure from an economic value test, noting that “[an economic value test] in Bryant . . . would have better accounted for the changes in media technology and the online music industry’s focus on single song sales, and therefore would have more effectively promoted the purpose of the Copyright Act.”

IV. THE INAPPLICABILITY OF THE ISSUANCE TEST IN A STREAMING ECONOMY

A per–album approach in rewarding statutory damages is fundamentally unfair to rightsholders in a streaming economy and threatens the basic copyright principles of authorship and originality. For one, the album, as an issuance tool, is seeing a great deal of abandonment and experimentation, due to certain innovations in digital distribution. Most notably, artists have the now unprecedented ability to continually alter the album post–release—a process that creates greater importance for the individual songs created at the time they are released, and less weight on the finality of the release. There has been absolute silence on the issue of Section 504(c) as it pertains to a streaming economy simply due to the fact that the technology has moved even faster than the Congress’ ability to effectuate new law. To illustrate, the following section and nucleus of the article’s theme analyzes the latest release from Mr. Kanye West, in an attempt to illustrate the inapplicability of a one–album, one–award framework for albums released on streaming services.

A. Kanye West and The Life of Pablo: A Living Breathing Changing Creative Expression

Following his 2013 departure record, anticipatory single releases, and live TV appearances, rap musician and business mogul Kanye West released his seventh studio album, *The Life of Pablo* (“Pablo”), on the evening of February 13, 2016. The release was initially featured on

94 See Oliver, supra note 14.
West’s website and on streaming service TIDAL. However, within hours of the release, West removed Pablo from his website and TIDAL over technical issues, and re-uploaded the album to TIDAL later that morning.98 In a following tweet, West noted that “[his] album will never . . . be on Apple [Music]. And it will never be for sale . . . you can only get it [streaming] on TIDAL.”99 Pablo subsequently amassed over 250 million streams on TIDAL within the first ten days of release100—equating to 94,000 album equivalent units sold101—and nearly 30,000 units sold directly on West’s website.102 In response to the exclusivity Twitter outburst, many upset fans resorted to illegally downloading the entire album from peer-to-peer networks; within 48 hours of the initial release, bit-torrent websites claimed to have facilitated over 500,000 illegal downloads.103 To the world’s surprise, however, this initial release was only the first iteration of the rap masterpiece. Pablo’s metamorphosis had only just begun.

A month later, West initiated the first of many alterations to Pablo by updating the lyrics and instrumentation to the album’s lead single, “Famous.”104 Two days later, West added two new featured vocalists to the track “Wolves” and created a new track titled “Frank’s Track” by severing the end of “Wolves” into two pieces.105 In the process, West tweeted that these edits were a way to convey his “living breathing

98 See Rys & Flanagan, supra note 96.
99 Kanye West @KanyeWest, TWITTER (Feb. 15, 2016, 6:41PM), https://twitter.com/kanyewest/status/709872072604913664/.
changing creative expression." To be clear, these alterations were not exhibited in the form of addendums or so-called “bonus tracks”; West altered his album as if an app developer released a software update.

As the public both praised and criticized the work, West directly implemented certain ideas and critiques in further changes to Pablo the following week. This second major revision altered twelve of the then nineteen song tracks, where West provided a host of additions, remixes, new edits, and removals from Pablo. West’s last volatile edit occurred four months after Pablo’s initial release when he added a final, twentieth song titled “Saint Pablo.” Since the addition of “Saint Pablo” in June 2016, the album has not changed any further, and is distributed worldwide only on major streaming services and for digital download on Apple Music.

Throughout these three major alterations, the title of the record, along with its album code on TIDAL and the corresponding album art, remained static. There was not, and has not been, any disparate “editions,” “deluxe” versions, nor any discrete products released subsequent to the initial album. Because of this, each iteration of the album other than its most recent version has been permanently overwritten and removed from TIDAL for consumption.

i. Current Standard for Altering Albums Post–Distribution

Mr. West, surprisingly, is the first artist who has been able to publicly alter the substance, arrangement, and coordination of an album of sound recordings once commercially available under the same release name. In a society where the album has traditionally been seen as a finalized work, with any additional material later included in deluxe editions, Kanye West has redefined the album art form altogether, proving that music can be unfinished and updated once it’s been released to an audience. Currently, most musicians looking to release an album to digital services utilize a distribution company or an aggregator, which digitally delivers an album to various digital stores and streaming platforms, in addition to

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108 Id.
administering royalty compensation. Many of these aggregators provide strict guidelines on their websites when it comes to altering albums post-distribution. According to these aggregators, once an album is distributed to stores and services, an artist cannot add, delete, or re-order songs, change the UPC or ISRC codes, or change the original release date information. The reason for these strict rules stems from the Recording Academy’s need to track album and individual recording sales using metadata, also known as UPC and ISRC codes. If an artist wishes to make any volatile changes to their work, the only viable procedure is to remove the old release and re-distribute a new version—a process that often takes several days to weeks. A second option is for artists to make a non-volatile change to their current release, such as edits to individual songs; however, it is not guaranteed that such edits will be reflected in all of the stores (TuneCore notes that iTunes and Amazon generally process changes, but takes two weeks). Of course, musicians will collect royalties for any streams or downloads of the previous work prior to take down, though it will technically be a completely separate work with different UPC and ISRC codes.

Although West may have been the first artist to pull off this feat of technicality, he is not the first artist to show a growing desire to update and perfect their art once commercially available. For example, the notoriously meticulous singer-songwriter Kate Bush re-tooled new versions of songs taken from her previous albums of *The Sensual World* and *The Red Shoes* and combined them into her 2011 release, *Director’s Cut*. An even more comparable example to *Pablo is U2’s 1997 album, *Pop*. There, the band had booked a tour prior to completion of the album, leading the group to release the album long before they felt the

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110 A non-exhaustive list of these aggregators includes TuneCore, CD Baby, Distrokid, The Orchard. TuneCore and Distrokid provide information on album alteration restrictions post-distribution. See, e.g., Can I Change an Album Once It’s Uploaded?, DISTROKID, https://distrokid.desk.com/customer/portal/articles/1290845-can-i-change-an-album-once-its-uploaded/-; How do I make changes to my release that has already been distributed to stores?, TUNECORE (last updated Dec. 9, 2015) http://au.help.tunecore.com/app/answers/detail/a_id/9/session/L2F2LzIvdGlzS8xNDg0MjAyNDYxL3NpZC9kTG5VeXQ4bh%3D%3D/ (last visited Apr. 20, 2018).

111 See id.


113 See id.

114 See id.


work was truly complete.\textsuperscript{117} Claiming that \textit{Pop} is “really the most expensive demo session in the history of music,” the band continually released new mixes and arrangements of songs as various singles, and included updated versions of many other songs on their subsequent compilation album, \textit{The Best of 1990–2000}.\textsuperscript{118} Like Bush and U2, West’s insatiable appetite for perfection likely influenced his updates on \textit{Pablo}, while newfound breakthroughs in digital distribution allowed West to mutate and overwrite the album under the same release title.

\textit{ii. Pablo’s Convoluted Copyright Web}

From a copyright standpoint, West and his various co–writers maintain copyright ownership with respect to the underlying compositions embedded on the record. Each individual song on the record features, on average, a dozen co–songwriters and publishers, a trend common in pop and hip–hop music.\textsuperscript{119} In addition, West, accompanied by various producers and featured artists, affixed these underlying compositions in a recorded medium—the copyrights of sound recordings. Furthermore, West and the label used thirty–two samples and interpolations in the making of the record.\textsuperscript{120} In these samples, the owners of both the original records and the compositions either granted license uses, or requested an interest in the copyrights, for unauthorized use by West would be deemed infringement. The creative aspect of arranging the songs into a cohesive body of work is also a copyrightable element and extends only to the arrangement globally. Adding an even further layer to this album pie, each individual iteration of the musical compositions, sound recordings, and compilations likely constitute derivative works of their predecessors.\textsuperscript{121} Copyright protection may extend to these iterations, but covers only the additions, changes, or other new material appearing for the first time.\textsuperscript{122}

Such complex copyright ownership within the album further suggests that the Bryant issuance test is inequitable in our current music–making system. Hypothetically, if two plaintiffs separately brought claims relating to an infringement of \textit{Pablo}—one who claims partial copyright in one


\textsuperscript{118} \textit{Id.}

\textsuperscript{119} Kanye West, \textit{The Life of Pablo Credits}, https://www.kanyewest.com/credits (last accessed on May 1st, 2018).

\textsuperscript{120} See \textit{id.}

\textsuperscript{121} See 17 U.S.C. § 101 (2016) (nothing that a derivative work includes “work[s] consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship[.]”).

recording and the second claiming ownership of ten recordings—the Bryant analysis would provide one statutory damage award to each work, as they were all issued under Pablo. This analysis would influence album distribution and creation altogether. For one, artists would be better off distributing their recordings as singles, as opposed to albums, which limits their creativity and innovation. Second, artists under this analysis would be better off not collaborating with others, as the mere co–ownership of copyrights to create one collective work creates an “all–for–one, and one–for–all” system, as opposed to each copyright claimant to receive his or her fair share of damages in the event of infringement.

iii. Pablo’s “Playlist” Qualities Are Not Afforded Copyright Protection

Another concern regarding the one–album, one–award framework revolves around the necessity to consider the copyrightable nature of playlists, which are currently not protected under United States copyright law. On its face, West’s Pablo, as was distributed and manipulated on TIDAL, can be easily interpreted as a playlist of music, as opposed to a cohesive album. The term “playlist” has been popularized by both conventional radio and more recently by digital streaming services and is defined as “a list of recordings to be played on the air by a radio station; also: a similar list used for organizing a personal digital music collection.”123 While playlists and compilations share many similarities, playlists are distinct in the modern music industry due to their ability to be constantly altered and arranged. Just as one would have made their high school sweetheart an arranged mixtape on cassette, a playlist functionally acts the same way, yet provides more malleability. A strong argument can be made that West’s use of TIDAL during this process exhibits playlist–like qualities, and therefore does not qualify as an album nor compilation at all.

Playlists have been increasingly important in the dissemination of music during the streaming revolution.124 On–demand streaming platforms, such as Spotify, Apple Music, and TIDAL, rely heavily on curating playlists of all genres to appeal to a wide range of consumers. Many of these services utilize computer algorithms based on consumer’s

listening history to predict interested artists, genres, and themes, automatically curating custom playlists for individual listeners weekly.\textsuperscript{125}

The legal issue of whether music playlists fall under the copyright definition of compilation has not yet been decided in the United States. However, cases involving pre-existing work and data—telephone books and maps—have generally held that compilations of quantifiable data may be protected under copyright if a selection or arrangement of pre-existing information is sufficiently creative enough to qualify as expression.\textsuperscript{126} While the issue of playlist rights specifically has yet to reach American courts, the British Courts have seen the issue, yet have not ruled on it conclusively. In Ministry of Sound v. Spotify, the High Court of London questioned whether Spotify’s curated playlists comprised of third-party songs infringed on Ministry of Sound’s compilations of unowned material.\textsuperscript{127} There, the music streaming company allowed its consumers to create both private and public playlists of individual songs on its database.\textsuperscript{128} The Ministry of Sound, a dance music company, routinely released commercial compilations that featured previously released music owned by various third parties, arranged in long, concert-like manner.\textsuperscript{129} While the two parties reached an agreement to settle the legal battle, it is understood that the playlists would be removed from Spotify’s search engine, although the individual recordings would not be deleted from the streaming service itself.\textsuperscript{130} This therefore still allows Spotify users the ability to re-build Ministry’s compilations and build user-generated playlists, yet prevents Spotify from promoting users’ recreations of the work.\textsuperscript{131}

Interestingly, in the United Kingdom, Section 3A of the Copyright, Designs, and Patents Act of 1988 grants protection to databases, which

\textsuperscript{125} See Adam Pasick, \textit{The magic that makes Spotify’s Discover Weekly playlists so damn good}, QUARTZ (Dec. 21, 2015), https://qz.com/571007/the-magic-that-makes-spotifys-discover-weekly-playlists-so-damn-good (“Playlists are the common currency on Spotify. More users knew how to use them and create them than any other feature.”). As a humorous nod to President Barack Obama, Spotify playlists have grown to such importance that the music technology company posted a job listing seeking a “President of Playlists”.


\textsuperscript{129} Id.


\textsuperscript{131} Id.
include collections of independent works which are arranged in a systematic or methodical way and are individually accessible by electronic or other means. However, Recital 19 of the EU Database Directive—a directive created by the European Parliament & Council which at the time encompassed the UK—noted that “as a rule, the compilation of several recordings of musical performances on a CD does not come within the scope of this Directive . . . because, as a compilation, it does not meet the conditions for copyright protection . . . .” Therefore, in the United States, while the copyrightability of compilations are valid should they meet the originality requirement, protectability of compilations in Europe is still very much up for debate.

Judges may analyze West’s collection of new work as a mere playlist—and thus potentially not protectable under copyright as a standalone work—because the act of constantly altering the work itself weakens the album’s “original work of authorship” requirement, since the artist has not set on one creative iteration of originality. Further, courts may take issue with the album in light of the Act’s “fixed” definition, which notes that a work is fixed when it “. . . is sufficiently permanent or stable to permit it to be perceived otherwise communicated for a period of more than transitory duration.” After all, what compilation could be protected if the compilation and embodied works within it are constantly changing? West would likely counter in that each iteration compilation does deserve its own protection, and while only one may be commercially available to the public, it should be protected as a new iteration develops. Akin to a saved “draft” document on an individual’s computer, who has released for consumption only the most recent version, the older works still exist in tangible form and should be given protective rights. As well, the older works should not discredit the newer work from protection.

Luckily, there has not yet been litigation alleging copyright infringement with respect to West’s Pablo. However, the aforementioned case study’s novel production, arrangement, and distribution methods illustrate the importance of protecting each individual copyrightable work in an album, irrespective of the bundled product in which it also happens to live.

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132 Copyright, Designs, and Patents Act 1988, c. 48, § 3A, (Eng.).
136 Id.
137 See U.S. Copyright Off., 61.0812, Circular 61: Copyright Registration for Computer Programs 3 (2012).
B. Traditional Albums and Compilations Differ in Definition and in Usage Throughout the Music Industry

A technical and cultural attitude shift towards albums, while a true concern, is rather forward–thinking. The reality remains that the recorded music industry will continue to package the album—in one form or another—for the foreseeable future. Nevertheless, one more reason the Bryant test does not hold water in today’s music industry is due to the industry–specific usage of the term compilation in music. Courts have repeatedly failed to acknowledge the subtle, yet important distinction between the terms album and compilation, as used in the music industry. Different from other creative industries, a compilation is a very special type of musical hodgepodge—a subset of a commonplace album—and should be treated as such. While albums generally refer to any and everything that is a cohesive body of work, a more music industry–centric definition of a compilation refers to a collection of songs which were initially not intended to be seen as a single work. Industry executives employ the term to market and sell a certain type of album, which is usually a patchwork of songs from various artists, or at times the same artist but different original albums, revolving around a similar theme—whether it be genre, popularity, era, etc. The primary motivation for labels to produce compilations is the ability to coordinate and arrange work that has already been released into the marketplace. Some examples include soundtrack compilations (The Great Gatsby), compilations curated by record labels to showcase their roster’s best work, and albums centered years or decades, such as Best of the ’70s.

Second, the Copyright Office utilizes Circulars, which explain in great detail the ins–and–outs of registration and protection of certain types of works and give an illustrative list of specific examples of copyrightable compilations. Some of these examples include directories of services in a specific geographic region, lists of best short stories from a particular

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140 See Wikström & Burnett, supra note 138, at 509.
143 See, e.g., Wikström & Burnett, supra note 138, at 509 (describing the various manifestations of the compilation album).
year, collections of sound recordings of top hits of a particular year, a book of greatest news photos, and websites containing a combination of text, photos, and graphics.\textsuperscript{145} The use of these examples in the \textit{Circular} comports with the widely–held mindset of what it means to be a compilation—an assemblage of pre–existing works that have already been released into the marketplace and subsequently arranged in a particular way so that the arrangement \textit{itself} becomes of artistic value.\textsuperscript{146} Interestingly, while it is by no means dispositive, the \textit{Circular} fails to mention the term \textit{album}, nor includes the ever–so–common example of a single recording artist’s commercially available album.\textsuperscript{147} For further proof of the industry’s idiosyncratic usage of the term \textit{compilation}, look no further than Billboard itself—a trade publication that releases weekly charts highlighting the industry’s most popular music in different genres. One such chart is actually titled “Compilation Albums.”\textsuperscript{148} Each album on this chart is released by “Various Artists” and are released as either a label, genre, or “Best Of” release, suggesting that these types of albums consist of an amalgamation of recording artists who would not otherwise be arranged on a release together.\textsuperscript{149}

Third, traditional albums differ from more specific compilations in that the copyright owner of a traditional album’s arrangement is most often the same owner of the embodied sound recordings on the album. In contrast, compilation albums are often arranged using licensed material from other record labels’ archives, leaving the record label in ownership of merely the creative assemblage of the embodied copyrightable elements. This further suggests that the purpose of the compilation language of Section 504(c) is meant to cover only compilation albums, so that the copyright owner of the compilation is not over compensated for copyrighted elements that he or she does not own. Instead, the copyright claimant would only be awarded for the infringement relating to the arrangement and coordination of the album.

\section*{V. The Solution to Album Damages: The Economic Value Test or Issuance Test Under Software Standards}

At this point, there lies a contradiction: on one hand, prior case law and the plain meaning of the statute indicate the need to follow a one–

\begin{footnotesize}
\begin{enumerate}
\item See id. at 1.
\item See McDonald, \textit{supra} note 139.
\item See id.
\item See id.
\end{enumerate}
\end{footnotesize}
album, one–award framework, and on the other, such a framework would both contradict the industry convention of compilations within the music industry and render damages inadequate to compensate artists who own both individual songs and the creative organization of an album. In balancing the registration, issuance, and independent economic value tests proffered by the various circuits, the independent economic value test most adequately protects the modern–day album in a single–driven, digital marketplace. Should the courts decide to utilize the issuance test under *Bryant*, they should acknowledge that in today’s music economy, albums are most often issued in pieces, similar to the television episodes analyzed in the original issuance case of *Twin Peaks*. Therefore, both tests have seemingly converged, while the independent economic value test still maintains a broader scope. Nevertheless, how will the courts be able to justify allowing per–song infringement to works that comport with the definition of compilation under the law?

As evidenced by the absence of litigation, such a solution is quite difficult. Since *Bryant*, there has not been any appellate level case further clarifying, distinguishing, or overturning the issuance test—leaving the judiciary divided on the issue. Interestingly, however, there has been a handful of subsequent district court opinions attempting to grapple with the *Bryant* rule. Specifically, in 2011, the Southern District of New York in *Arista Records LLC v. Lime Group LLC* created a clarification to *Bryant*, holding that certain plaintiffs may recover a per–song statutory damage award so long as “(1) Plaintiffs made [the recording] available as an individual track, and (2) that [track] was infringed . . . [upon] . . . during the time period in which it was issued as an individual track.” Fittingly, the authoring judge of *Bryant*’s opinion—District Judge Kimbra Wood—provided the opinion in *Arista*, allowing a plaintiff to recover statutory damages on a per recording basis where such recordings were issued as individual tracks, even though at some point in time the recordings were also part of an album or compilation. In distinguishing *Bryant*, Judge Wood claimed that the plaintiffs in *Bryant* were issuing the later infringed works in compilation form, and never sold the individual contents separately. Therefore, the works could only be seen as a compilation. Since the infringed copyrights in *Arista* were issued in both an album and individual track format, each issuance of the work was deemed a work.

151 *Id.* at *4.
152 *Id.* at *3.
153 *Id.*
154 *Id.* at *4.
A step in the right direction, Arista finally begun to open up the possibility for rightsholders to earn their fair share. Nevertheless, even though other district courts have begun to cite to Arista in lieu of Bryant,\footnote{See, e.g., MacAlmon Music, LLC v. Maurice Sklar Ministries, Inc., 2015 WL 794327, at *5 (D. Colo. Feb. 4, 2015); Capitol Records, Inc. v. MP3tunes, 48 F. Supp. 3d 703, 721 (S.D.N.Y. 2014); Lucerne Textiles, Inc. v. H.C.T. Textiles Co., Ltd., 2013 WL 174226, at *2 (S.D.N.Y. Jan. 17, 2013).} the case law in the Second Circuit—Bryant—is still controlling, and does not definitively carve out individually issued recordings, as Judge Wood does in Arista. Only time will tell whether an appellate court decides to distinguish Bryant in a similar manner. Until then, courts should continue to assess the nature of the album’s issuance and seek to contextualize the rationale of Section 504(c) within today’s music economy. Such an approach will fairly compensate partial rightsholders of works, encourage creative collaboration, and allow technological innovation to move in tandem with creative innovation and distribution, allowing all of the future young Jimmys to reap the benefits of the streaming revolution.